COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2014

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2013AP730-CR **Cir. Ct. No. 2011CF479**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PHILIP B. CAMINITI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 LUNDSTEN, J. Philip Caminiti appeals the circuit court's judgment of conviction for eight counts of conspiracy to commit child abuse. He also appeals the order denying his motion for postconviction relief. Caminiti was convicted after an eight-day jury trial at which the prosecutor elicited evidence

that Caminiti, as the leader of a small, close-knit religious community or church, instructed and pressured attendees to discipline infants starting as young as two or three months of age by striking their bare bottoms using wooden spoons and dowels with an amount of force that caused significant bruising.

¶2 Caminiti raises several challenges to his convictions, organized into three main groupings. First, Caminiti argues that the prosecutor's theory of prosecution violated three constitutional rights, which Caminiti characterizes as: (1) his right to advocacy, (2) his right to freedom of religion, and (3) the parents' right to raise their children as they see fit. Second, Caminiti argues that the circuit court committed two evidentiary errors: admitting expert testimony on the parents' statutory reasonable discipline privilege, and admitting evidence that one of the parents pled guilty to and was convicted of child abuse. Third, he argues that trial counsel was ineffective by failing to object to two alleged errors in the jury instructions. In addition, Caminiti argues that the cumulative effect of errors was not harmless and that we should reverse in the interest of justice. We reject Caminiti's arguments, and affirm.

Background

Nature Of The Charges Against Caminiti

¶3 The eight counts against Caminiti were for conspiracy under WIS. STAT. § 939.31 (inchoate conspiracy) to commit child abuse under WIS. STAT. § 948.03(2)(b).[1] Thus, the State had to show for each count that Caminiti, "with

[1] All references to the Wisconsin Statutes are to the 2011-12 version. We use the current version of the statutes for ease of reference. Caminiti does not contend that there have been any relevant changes in the statutes since the times his crimes were committed.

intent that [the crime of child abuse] be committed, agree[d] or combine[d] with another for the purpose of committing [child abuse]" and that "one or more of the parties to the conspiracy [did] an act to effect its object." *See* § 939.31.[2] As applicable to this case, child abuse is "intentionally caus[ing] bodily harm to a child." *See* § 948.03(2)(b). "Bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." WIS. STAT. § 939.22(4).

¶4 Each of the eight counts pertained to a different child. Count 1 involved discipline of a child by a non-parent, the child's mother's boyfriend; Counts 2 through 8 involved discipline of a child by the child's own parent or parents. In none of the charged instances was it alleged that Caminiti personally struck a child.

¶5 As an affirmative defense, Caminiti relied on the parents' statutory privilege to reasonably discipline their children. Pertinent here, persons "responsible for the child's welfare" are privileged to engage in "reasonable discipline" under WIS. STAT. § 939.45(5), which provides:

> **Privilege.** The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct. The

[2] The inchoate conspiracy statute provides:

> Except as provided in ss. 940.43(4), 940.45(4) and 961.41(1x), whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

WIS. STAT. § 939.31.

> defense of privilege can be claimed under any of the following circumstances:
>
> ….
>
> (5) …
>
> (b) When the actor's conduct is reasonable discipline of a child by a person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person believes is necessary. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or creates an unreasonable risk of great bodily harm or death.

¶6 We address the privilege in greater detail below, particularly as relevant to two of Caminiti's arguments: (1) that the prosecution's theory violated the parents' constitutional rights and (2) that the circuit court erred by admitting expert testimony on the reasonable discipline privilege. There is no dispute that Caminiti may assert defenses based on the parents' constitutional rights and on the reasonable discipline privilege.

Evidence At Trial

¶7 The prosecutor presented a number of non-expert, fact witnesses, including a detective and other law enforcement officers who interviewed Caminiti and parents, parents who testified under use immunity, and former church attendees. Caminiti testified in his defense. We summarize some of the fact-witness testimony against Caminiti.[3]

[3] We summarize the expert testimony in the discussion below when addressing Caminiti's arguments relating to that testimony.

¶8 Most of the evidence we summarize relates to all of the children. Some of the evidence relates to particular children but is representative. Caminiti does not make child-specific arguments.

¶9 Caminiti was the pastor or "head elder" of a close-knit religious community or church consisting of approximately fifteen families. He emphasized strong theological unity among attendees, enforced by the practice of "disassociation" or "shunning" of attendees when unity fails. One former attendee explained that he "feared [Caminiti] more than I feared my relationship with God."

¶10 Caminiti instructed parents who were part of the church to discipline their children by striking the children's bare bottoms with wooden spoons and dowels. If church attendees approached him and said that they were having trouble with the discipline, Caminiti would "counsel them on the correct way." Caminiti "interpreted how, when, [and] why [a rod] would be used." Caminiti instructed that the child's bottom must be bare, and the rod should be an instrument such as a "wooden dowel or the rung off of a chair … about three-quarters of an inch in diameter and approximately a foot long." The purpose of the discipline was "[t]o cause pain," and Caminiti did not consider bruises a "sign of something bad."[4]

¶11 In Caminiti's view, an infant could be guilty of a "selfish cry." Specifically, Caminiti instructed that, if an infant's basic needs were met but the

[4] The parties refer to the type of discipline that Caminiti taught as "rod discipline." We follow the parties' lead and refer to it that same way.

infant persisted in crying or fussing, "it would be a selfish cry and warrant a rod spanking."

¶12 Caminiti would hold meetings with parents to discuss and demonstrate rod discipline. During at least one meeting, "[h]e used the rod and he hit his leg with it, and he told [the parents] that he was showing them how to use the rod for training their children." Caminiti said at the meeting that more than one strike was required, and also said he had once hit himself so hard during a demonstration that "he made himself cry."

¶13 Sunday services were held at Caminiti's house or another residence. Parents would carry a wooden dowel or "stick" to services in their hands, pockets, or diaper bags.

¶14 According to a former church attendee, Caminiti taught "[t]hat the Bible has a specific instruction and a specific tool for disciplining [one's] child," which took the form of "a dowel approximately 16 to 18 inches long and about three-quarters round." Caminiti explained that "that specific rod" is what "the Bible says … you should use, and he hit his leg to show … how to use the dowel on [a] child." Exclaiming "'Ow, that really hurt,'" Caminiti struck himself "much harder than [the former attendee] would ever consider striking any child, let alone [his] 14-month-old." The former attendee had no doubt that Caminiti was demonstrating the degree of force to be applied to the children.

¶15 A typical incident involving the rod discipline Caminiti taught involved a nine-month-old child who was being "fussy" in her high chair while being fed:

> [The child] began getting fussy, and evidently [the parent] went through telling the child no and giving a squeeze to

> the leg or the arm, and she still remained fussy. At that point it was determined that [the child] was being selfish. [The parent] then removed her from the highchair, laid her face down on the kitchen floor. He pulled down her diaper and hit her with a wooden rod twice on the bare butt.

In another typical incident, a parent testified about teaching her nine-month-old infant the difference between "loud and quiet" and spanking the child's bare bottom with a wooden spoon when the child did not comply.

¶16 While these two examples involve nine-month-old children, there was evidence that children of church attendees were subjected to forms of discipline using a rod starting as young as two or three months of age. Some of the parents denied this, but even these parents admitted to using rod discipline before their children had reached one year of age. Caminiti believed that a child as young as one and a half months old could be disciplined with a rod.

¶17 The rod discipline Caminiti taught often left marks or bruises. At least one parent feared taking her child to the doctor because the bruising would be detected. In one instance, a child bled after being disciplined, although the parent stated that it was "just a little bit of blood."

¶18 When small children fussed or cried during services, Caminiti would give the parents a "look" that the parents understood meant that they needed to take action. According to witnesses, what happened next was:

> "[P]arents would take their children out of the assembly and go into a basement or a back room, and we could hear a whack whack whack, and then the scream of a child."
>
> "[Y]ou would hear … a rod hitting skin. It was unmistakable," followed by "bloodcurdling screams from these babies."
>
> "[You would hear] [t]he sound of the dowel coming down, and cries."

¶19 In Caminiti's testimony, he confirmed that he believes a parent can recognize a "selfish cry" when an infant fusses or cries for no apparent reason. He said that he follows what he contends is a literal interpretation of the Bible that, in his view, "teaches … spanking with a spanking stick" for child discipline. Caminiti testified that the purpose of rod discipline is to cause pain. Caminiti explained: "[Y]ou want to cause enough pain to make the action that [the children are] being disciplined for regrettable, and so they change their mind ...."

Discussion

¶20 We address Caminiti's arguments using his three main groupings. We reference the evidence above and other evidence as needed for discussion of particular arguments.

A. Whether The Prosecution Violated Caminiti's Right To Advocacy, Caminiti's Right To Freedom Of Religion, Or The Parents' Right To Raise Their Children As They See Fit

1. Right To Advocacy

¶21 Caminiti argues that his prosecution violated his free speech right to advocacy under ***Brandenburg v. Ohio***, 395 U.S. 444 (1969). ***Brandenburg*** explains that advocacy of the use of force is constitutionally protected, within limits:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in ***Noto v. United States***, [367 U.S. 290, 297-98 (1961)], "the mere abstract teaching … of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."

Id. at 447-48 (footnote omitted).

¶22 We begin by noting that Caminiti's free speech argument is not well developed. It consists of three paragraphs in his principal brief and several additional, but somewhat repetitive, paragraphs in his reply brief that do little to flesh out the legal basis for his argument. We address the arguments Caminiti makes. We do not develop arguments for him. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) ("We cannot serve as both advocate and judge.").

¶23 Caminiti argues that the evidence does not show that he "instructed anyone to spank a specific child at any specific time." As we understand it, Caminiti is arguing that this shows he was merely advocating the use of force in the abstract. We are not persuaded.

¶24 The ***Brandenburg*** test is not, to paraphrase Caminiti's argument, a "specific [victim] at a[] specific time" test; it is an "inciting or producing imminent lawless action" test. *See* ***Brandenburg***, 395 U.S. at 447-48. And, Caminiti provides no support for the proposition that the evidence here is insufficient to show that he incited or produced "imminent" lawless action. We conclude that the jury could have reasonably inferred that Caminiti was inciting or producing the imminent use of abusive force against the children, particularly (but not only) when Caminiti gave parents a "look" or other indication during church services, causing the parents to promptly remove their children from the room in order to mete out the rod discipline Caminiti had taught them. Stated another way in terms of ***Brandenburg***, the jury could reasonably infer that Caminiti was

"'preparing a group for violent action and steeling it to such action.'" *See* ***id.*** at 448 (quoted source omitted).[5]

2. Right To Freedom Of Religion

¶25 Caminiti argues that his prosecution violated his right to freedom of religion. We disagree.

¶26 We analyze Caminiti's freedom of religion claim under the state constitution, because Caminiti relies on it and because it provides broader freedom of religion protection than the First Amendment. *See* ***State v. Miller***, 202 Wis. 2d 56, 64, 549 N.W.2d 235 (1996) (referring to "the more expansive protections envisioned by our state constitution").

¶27 Applying the state constitution, we use a four-part, burden-shifting test:

> [T]he challenger carries the burden to prove: (1) that he or she has a sincerely held religious belief[] (2) that is burdened by application of the state law at issue. Upon such proof, the burden shifts to the State to prove: (3) that the law is based on a compelling state interest, (4) which cannot be served by a less restrictive alternative.

Id. at 66.[6]

[5] In his principal brief, Caminiti makes statements in passing suggesting that the jury should have received an instruction on his First Amendment right to advocacy. We agree with the State, however, that Caminiti fails to develop this argument on appeal. We therefore decline to address it. Caminiti's attempt to build on this argument in his reply brief is too little too late.

[6] In ***State v. Miller***, 202 Wis. 2d 56, 549 N.W.2d 235 (1996), our supreme court explained that the United States Supreme Court in ***Employment Division, Department of Human Resources of Oregon v. Smith***, 494 U.S. 872, 879 (1990), "repudiated use of the compelling state interest standard in claims based solely on the Free Exercise Clause of the First Amendment." *See* ***Miller***, 202 Wis. 2d at 67; *see also* ***Coulee Catholic Schs. v. LIRC***, 2009 WI 88, ¶39 n.13, (continued)

¶28 The State concedes that Caminiti has a sincerely held religious belief in rod discipline that is burdened by the child abuse statute. Thus, the question becomes whether the State has demonstrated that it has a compelling interest that cannot be served by a less restrictive alternative.

a. Compelling Interest

¶29 The State argues that it has a compelling interest in preventing child abuse, including abuse by a child's own parents. We agree. That this interest is compelling is not seriously debatable, and Caminiti does not contest the general proposition that it is. Rather, Caminiti asserts more specifically that the State lacks a compelling interest in "preventing the minor, transient pain and unintended marks or bruising … that are the normal consequence of any form of corporal punishment."

¶30 Caminiti's argument is unpersuasive because it does not address the pertinent question under ***Miller***: whether "the law" at issue—here, the child abuse statute—is based on a compelling interest—here, preventing child abuse. *See* ***id.*** at 66. Clearly it is. The question is not, as Caminiti seems to think, whether the State has a compelling interest in prohibiting all "normal consequence[s] of any form of corporal punishment." The laws at issue here do not prohibit corporal punishment generally. Caminiti's framing of the question goes nowhere because it fails to address the actual prohibited behavior: the unreasonable and intentional infliction of bodily harm on a child. *See* WIS. STAT. §§ 939.45(5) and 948.03(2)(b).

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320 Wis. 2d 275, 768 N.W.2d 868 (noting that the Supreme Court in ***Smith*** "held that there is no individual religious exemption from neutral laws of general applicability").

¶31 Alternatively, if Caminiti means to argue that his right to freedom of religion protects him from prosecution for teaching conduct that involves only "minor, transient pain and unintended marks or bruising … that are the normal consequence of any form of corporal punishment," we are not persuaded. In this respect, Caminiti seems to ask us to assume facts favorable to him, namely, to assume that what he did was merely to teach normal and reasonable corporal punishment. Caminiti points to evidence favorable to his point of view. However, Caminiti provides no reason for why we would review the evidence in a light most favorable to Caminiti's defense. Rather, we must view the evidence in a light that supports the jury's verdict. *See* ***State v. Kimberly B.***, 2005 WI App 115, ¶21, 283 Wis. 2d 731, 699 N.W.2d 641 ("If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict ...."). Here, the jury could have reasonably inferred from the evidence that Caminiti was instructing and pressuring the parents to engage in punishment that was more severe than minor, transient pain involving only unintended marks or bruising, or other "normal consequence[s] of any corporal punishment."

b. No Less Restrictive Alternative

¶32 The State argues that its compelling interest in preventing child abuse cannot be served by an alternative that is less restrictive of religious freedom than affording an accused the reasonable discipline privilege. As we understand it, the State argues that anything less restrictive would allow a person's religious beliefs to prevent the prosecution of egregious cases of child abuse. We agree with the State and find Caminiti's limited arguments to the contrary unpersuasive.

¶33 Caminiti argues that other states have less restrictive alternatives that allow parents to discipline their children even if the discipline causes only "the type of transitory pain and minor, unintended marks at issue here." Again, however, Caminiti shifts the analysis from the law at issue to a view of the evidence that favors him. And, once again, he provides no support for an analysis that requires us to view the evidence in a light suggesting that the punishment was in fact limited and reasonable, rather than unreasonably excessive in light of the ages of the children and other circumstances.

¶34 We acknowledge that Caminiti may be making an additional argument relevant to his free speech and freedom of religion claims, namely, that he was prosecuted based on a "per se" theory that all corporal punishment of infants and toddlers is child abuse. However, to the extent this argument is developed, Caminiti develops it in the section of his briefing addressing the parents' constitutional rights and reasonable discipline privilege. We address and reject that argument in the next section.

3. Parents' Constitutional Rights And Reasonable Discipline Privilege

¶35 Caminiti argues that his prosecution violated the parental right to raise children as the parent sees fit. There is no dispute that the parental right to the custody and control of children includes a right to discipline the children. *See, e.g.*, ***Doe v. Heck***, 327 F.3d 492, 522 (7th Cir. 2003). And, as we have noted, the State does not dispute that Caminiti may assert defenses based on parental rights.

¶36 A parent's right to discipline is not unlimited. It is subject to a reasonableness standard marking the line between constitutionally protected discipline and child abuse. In ***Kimberly B.***, we explained and summarized this "reasonable discipline" privilege, as codified in WIS. STAT. § 939.45(5):

Pursuant to WIS. STAT. § 939.45(5), a person responsible for the welfare of a child, such as a parent, enjoys a privilege to reasonably discipline the child by use of physical force. Section 939.45(5)(b) provides that a parent's conduct is privileged:

> When the actor's conduct is reasonable discipline of a child by a person responsible for the child's welfare. Reasonable discipline may involve only such force as a reasonable person believes is necessary. It is never reasonable discipline to use force which is intended to cause great bodily harm or death or creates an unreasonable risk of great bodily harm or death.

This privilege constitutes an affirmative defense to a criminal charge of physical abuse of a child under WIS. STAT. § 948.03. *See* § 939.45 ("The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct."). Once parental privilege is raised as an affirmative defense, the burden shifts to the State to disprove the parental privilege defense beyond a reasonable doubt.

… [T]he plain language of § 939.45 requires that (1) the use of force must be reasonably necessary; (2) the amount and nature of the force used must be reasonable; *and* (3) the force used must not be known to cause, or create a substantial risk of, great bodily harm or death. If parental conduct fails to satisfy even one of these prongs, then the parent is not protected by the privilege. Thus, to overcome the privilege of parental discipline in Wisconsin, the State must prove beyond a reasonable doubt that only one of these three prongs is not present.

….

Reasonable force is that force which a reasonable person would believe is necessary. WIS JI—CRIMINAL 950. Whether a reasonable person would have believed the amount of force used was necessary and not excessive must be determined from the standpoint of the defendant at the time of the defendant's acts. ***Id.*** The standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense. ***Id.***

> "The test of unreasonableness is met at the point at which a parent ceases to act in good faith and with parental affection and acts immoderately, cruelly, or mercilessly with a malicious desire to inflict pain, rather than make a genuine effort to correct the child by proper means." There is no inflexible rule that defines what, under all circumstances, is unreasonable or excessive corporal punishment. Rather, the accepted degree of force must vary according to the age, sex, physical and mental condition and disposition of the child, the conduct of the child, the nature of the discipline, and all the surrounding circumstances. *See* WIS JI—CRIMINAL 950.

Kimberly B., 283 Wis. 2d 731, ¶¶29-33 (some citations omitted).

¶37 The reasonable discipline privilege strikes a balance between parents' constitutional rights to the care and control of their children and the State's interest in preventing child abuse. *See* ***Doe***, 327 F.3d at 520 (balance must be struck between the fundamental right to the family unit and the State's interest in protecting children from abuse).

¶38 As we understand it, Caminiti's primary argument based on the parental right to discipline and on the statutory privilege is that the prosecutor's theory of the case was contrary to the parents' rights and their privilege because the prosecutor advanced a "per se" theory that all corporal punishment of infants and toddlers was child abuse. Caminiti asserts that "the [prosecutor] theorized that Caminiti conspired to commit child abuse because … *all* spanking of infants and toddlers was inappropriate." Caminiti argues that this "per se" theory cannot be squared with the parents' rights to discipline and the privilege.

¶39 We need not resolve whether such a "per se" theory is constitutionally permissible because we disagree with Caminiti that it was the prosecutor's theory here. We also disagree with the implicit assumption in Caminiti's argument that the jury likely reached a verdict based on this per se

theory. Rather, we agree with the State that the prosecutor advocated a "detailed, contextual child-abuse analysis, not a *per se* approach." This is evident from the extensive fact-witness testimony that the prosecutor elicited, the prosecutor's closing arguments, in which the prosecutor relied on that testimony after reviewing it at great length, and the jury instructions.

¶40 There would have been no reason to focus on and argue the specifics of this case in such detail if the prosecutor was relying on a per se theory. And, nowhere did the prosecutor argue that the jury should convict Caminiti because all physical discipline of infants and toddlers is criminal.

¶41 Consistent with the privilege as explained in ***Kimberly B.***, the instructions here informed the jury that it must assess reasonableness based on what an ordinary person in the parent's position would believe, considering *all* of the circumstances:

> The law allows a parent to use reasonable force to discipline that child. Reasonable force is that force which a reasonable person would believe is necessary.
>
> Whether a reasonable person would have believed that the amount of force used was necessary and not excessive must be determined from the standpoint of the parent at the time of the parent's acts. The standard is what a person of ordinary intelligence and prudence would have believed in the parent's position under the circumstances that existed at the time of the alleged offense.
>
> In determining whether the discipline was or was not reasonable, you should consider the age, sex, physical and mental condition and disposition of the child, the conduct of the child, the nature of the discipline, and all the surrounding circumstances.

"We presume that the jury follows the instructions given to it." ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

¶42 Caminiti's assertion that he was prosecuted based on a "per se" theory appears to be based primarily on the expert testimony that the prosecutor introduced and referenced during closing arguments. The prosecutor's experts were a medical doctor specializing in pediatrics and child abuse and a doctor of clinical psychology with extensive training and experience in child development.

¶43 The physician expert testified that the American Academy of Pediatricians does not recommend corporal punishment for children because it has been shown to have negative consequences and to be ineffective. She recommended against corporal punishment with an instrument because of the risk of physical injury if a parent gets carried away or strikes the wrong body part. According to the physician expert, infants and young toddlers cannot control crying or moods. Also, children under 18 months old cannot associate pain with unwanted behavior and therefore it is not acceptable to use physical discipline on children under that age. The physician expert opined that children who are subjected to punishment as the children here were are subjected to child abuse.

¶44 The psychological expert testified that the Canadian Psychological Association forbids corporal punishment before age two and that the American Psychological Association is considering a proposal to forbid corporal punishment prior to age one. In addition, the psychological expert gave testimony generally tending to discredit the proposition that infants could engage in a "selfish cry" deserving of punishment and the proposition that corporal punishment was likely to be effective on infants and young toddlers.

¶45 It is obvious from our summaries of the experts' testimony that the *experts* would recommend the type of per se rule Caminiti is talking about.

However, this does not show that Caminiti was prosecuted based on a per se theory, let alone that the jury reached its verdict based on such a theory.

¶46 Caminiti may be making an additional, implicit argument that the evidence was insufficient for the jury to find that the parents used an unreasonable level of discipline. If so, we disagree. Once again, Caminiti mistakenly views the evidence in a light most favorable to him instead of to the jury's verdict. And, none of the supporting case law he cites involves comparable evidence of physical discipline directed at such young children.[7]

B. Whether The Circuit Court Erred By Admitting The Expert Testimony Or The Testimony That A Parent Pled Guilty To And Was Convicted Of Child Abuse

1. Expert Testimony

¶47 Caminiti argues that the circuit court erred by admitting the State's expert testimony and that the testimony was prejudicial. Caminiti argues that the expert testimony was irrelevant to the reasonable defense privilege and was therefore inadmissible. The State appears to agree that the dispositive question

[7] The case that comes closest is ***People v. Karen P.***, 692 N.E.2d 338 (Ill. App. Ct. 1998), but even then the facts are very different. In particular, the parent in ***Karen P.*** did not begin spanking the child with a wooden spoon until the child was two and a half years old, the spankings were administered over the child's clothes, and only once did the spankings result in a "very small" bruise, when the child was about three and a half years old. *See* ***id.*** at 339, 346. The other cases that Caminiti cites are more dissimilar. *See* ***Doe v. Heck***, 327 F.3d 492, 504, 521-22 (7th Cir. 2003) (spanking of fourth-grade child with a spatula or plastic paddle); ***State v. Wilder***, 748 A.2d 444, 446-48, 456-57 (Me. 2000) (grabbing and squeezing nine-year-old child's shoulder, and grabbing and squeezing child's mouth firmly enough to leave bruising); ***State v. Adaranijo***, 792 N.E.2d 1138, 1138-40 (Ohio Ct. App. 2003) (slapping teen-aged child on the face, hitting child on the thigh, and threatening to severely beat the child without carrying out the threat).

regarding the admissibility of the expert testimony is whether it was relevant to the reasonable defense privilege.

¶48 Caminiti's more specific arguments are difficult to make sense of. He appears to concede that the reasonable discipline privilege is an objective standard but nonetheless argues that "this objective reasonableness determination must be based on facts known to the person asserting the privilege at the time of the alleged offense." He argues: "Because there is no evidence that Caminiti knew the experts' opinions or theories, developed over decades of specialized training, those opinions lacked any legitimate tendency to make any fact that is of consequence to this action any more or less likely." Accordingly, Caminiti seems to be arguing that the expert opinions have no probative value for purposes of the privilege because those opinions are not something Caminiti actually knew at the pertinent times.

¶49 We are uncertain why Caminiti focuses only on what *he* knew and not on what the *parents* knew. Regardless, the pertinent question is not whether the expert opinions are irrelevant because Caminiti or the parents did not know of those opinions. Rather, because the standard the jury was required to apply is a reasonable person standard, the pertinent question is whether the expert opinions are irrelevant to what a reasonable person of ordinary intelligence and prudence would believe under all of the circumstances. *See* ***Kimberly B.***, 283 Wis. 2d 731, ¶32; WIS JI—CRIMINAL 950. As far as we can tell, Caminiti does not address the question that matters.

¶50 We could, then, end our analysis of the expert testimony here and conclude that Caminiti fails to show that the circuit court erred. However, we will assume, without deciding, that the circuit court erred by admitting the expert

testimony that Caminiti complains of. Nonetheless, we conclude that any error in admitting the testimony was harmless because "'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty'" even without the expert testimony. *See* ***State v. Deadwiller***, 2013 WI 75, ¶41, 350 Wis. 2d 138, 834 N.W.2d 362 (quoted source omitted) (stating the harmless error test).

¶51 Our review of the eight-day jury trial shows that the prosecutor relied heavily on damaging fact-witness testimony, including that of investigating officers, parents, and former church attendees. The prosecution also benefitted from Caminiti's own incriminating testimony. The experts' testimony was not the centerpiece of the prosecutor's case.

¶52 In addition, during closing arguments the prosecutor made express reference to the privilege instruction the jury would receive, emphasizing that the jury's duty was to assess the reasonableness of the discipline from an ordinary person's perspective based on all of the circumstances, not to assess reasonableness from the experts' perspective. The prosecutor said:

> I submit to you we're not here looking at reasonable discipline. You know what it is. You parents know what reasonable discipline is, and then here's the instruction [on reasonable discipline]. Very helpful. Very sensible. A parent can use reasonable force to discipline the child which is a force a reasonable person would believe is necessary…. A reasonable person. That's you....
>
> … What would an ordinary person, an ordinarily intelligent and prudent person have believed in the parent's position under the circumstances that existed at the time of the alleged discipline ....
>
> Let's think about this for a minute. Ordinary, a person of ordinary intelligence and prudence. I think I'm looking at 15 of you right now.

¶53 It is true, as Caminiti points out, that the prosecutor referenced the expert testimony repeatedly during closing arguments. However, the references were for the most part brief. And, while the expert testimony was damaging, it was not nearly as damaging as the prosecutor's fact-witness testimony.

¶54 Simply put, much of the expert testimony only underscored what a person of ordinary intelligence and prudence would have already believed: that infants and young toddlers who cry, despite having been fed and changed, are not necessarily being "selfish" or otherwise misbehaving, and that a reasonable person would not believe that such behaviors are likely to be corrected by the type of corporal punishment used here.

2. Testimony That Parent Pled Guilty To And Was Convicted Of Child Abuse

¶55 Caminiti argues that the circuit court erred by allowing the prosecutor to elicit testimony from one of the parent witnesses, Caminiti's brother John, that John had pled guilty to and was convicted of child abuse for conduct underlying some of the charges against Caminiti. The State appears to concede error. *See* ***State v. Smith***, 203 Wis. 2d 288, 296-97, 553 N.W.2d 824 (Ct. App. 1996) (when evidence of prior convictions is admitted for impeachment purposes, the "nature of the convictions is not to be discussed by the proffering party"). The State argues, however, that any error was harmless. We agree.

¶56 When we consider the other evidence against Caminiti, the prosecutor's closing arguments, and the jury instructions as already discussed, it remains clear beyond a reasonable doubt that a rational jury would have found Caminiti guilty without the plea-and-conviction evidence. *See* ***Deadwiller***, 350

Wis. 2d 138, ¶41. Moreover, as Caminiti acknowledges, the circuit court gave a limiting instruction explaining that:

> Evidence has been received that one of the witnesses in this trial has been convicted of a crime. The evidence was received solely because it bears upon the credibility of the witness. It must not be used for any other purpose.

Caminiti argues that the instruction was not a "proper" one because it was not sufficiently detailed. However, the fact that the instruction was not as detailed as Caminiti might have liked does not change our conclusion that any error regarding the plea-and-conviction testimony was harmless.

C. Whether Trial Counsel Was Ineffective By Failing To Object To Two Alleged Errors In The Jury Instructions

¶57 Caminiti argues that trial counsel was ineffective by failing to object to two aspects of the jury instructions. To succeed based on this argument, Caminiti must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***State v. Roberson***, 2006 WI 80, ¶¶24, 28, 292 Wis. 2d 280, 717 N.W.2d 111 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)).

¶58 As we shall see, these arguments can be resolved solely with reference to the prejudice prong. We "may decide ineffective assistance claims based on prejudice without considering whether the [defendant's] counsel's performance was deficient." ***Id.***, ¶28. To show prejudice, Caminiti must show that there is "a reasonable probability that, but for counsel's error(s), the result of the trial would have been different." ***Id.***, ¶29.

¶59 Caminiti's first ineffective assistance argument relates to the jury instruction on Count 1, the only count involving discipline by a non-parent. Caminiti's other argument relates to all counts.

1. Instruction For Count 1

¶60 Count 1 against Caminiti was based on discipline of a child by the child's mother's boyfriend, Kurtis Hahn. There is no dispute that the reasonable discipline privilege under WIS. STAT. § 939.45(5) did not apply to Hahn, and that the jury received no instruction on the statutory privilege with respect to Hahn. Caminiti argues, however, that trial counsel should have objected to the absence of a privilege instruction for Hahn because there is a similar common-law privilege that applies to individuals acting in place of a parent.

¶61 The State argues that counsel was not deficient because the pertinent law is unclear and that, even if counsel was deficient, Caminiti cannot show prejudice because the jury found Caminiti guilty on each of the other counts for which the statutory privilege was raised.

¶62 Caminiti's briefing does not provide a meaningful response to the State's no-prejudice argument. As far as we can tell, Caminiti appears to be arguing that any failure to instruct on an available affirmative defense is tantamount to a failure to instruct on an element of the crime and, thus, per se prejudicial. However, Caminiti provides no authority that stands for this proposition. *Cf.* ***State v. Gordon***, 2003 WI 69, ¶¶40-41, 262 Wis. 2d 380, 663 N.W.2d 765 (overruling cases establishing a rule of automatic reversal when a jury instruction omits an element of the offense, and "return[ing] this issue to the realm of ***Strickland***'s prejudice analysis"). We consider his prejudice argument undeveloped at best, and reject it on that basis.

2. Instruction For All Counts

¶63 Caminiti's argument that applies to all counts relates to how the elements of conspiracy under WIS. STAT. § 939.31 interact with a privilege such as the reasonable discipline privilege and whether the jury was instructed accordingly. There is no dispute that the elements of conspiracy under § 939.31 and the elements of child abuse under WIS. STAT. § 948.03(2)(b) required the State to prove that Caminiti intended and agreed with another to intentionally cause bodily harm to a child. There is also no dispute that, because the reasonable discipline privilege was at issue, the State had to prove that the discipline was unreasonable.

¶64 Based on these undisputed points, Caminiti argues that the law required the State to prove—and correspondingly required the jury to be instructed—that Caminiti "could be convicted only if he intended and agreed that the parents discipline their children unreasonably." Caminiti appears to be arguing that, to convict him of conspiracy, the State had to show that Caminiti intended and agreed that the discipline to be imposed would be unreasonable because the unreasonableness of the discipline is an element of the conspiracy crime. According to Caminiti, the jury instructions did not give the jury this information and trial counsel was, therefore, ineffective by failing to object to the instructions.

¶65 We disagree with Caminiti's analysis of the law and, therefore, disagree that there could be prejudice based on counsel's failure to object to the jury instructions for all counts. Although the State had to prove that the discipline was unreasonable, the State's burden on the affirmative defense does not make the unreasonableness of the discipline an element of child abuse or an element of the conspiracy crime.

¶66 If Caminiti means to make some other argument regarding how the jury was instructed on the nature of a conspiracy charge or the privilege, his argument is unclear. Suffice it to say that we are satisfied that the instructions adequately informed the jury of the elements of conspiracy and the nature of the privilege. Accordingly, we see nothing in Caminiti's arguments showing that counsel's failure to object to those instructions was ineffective assistance.[8]

[8] In addition to the detailed reasonable discipline privilege instruction we have already described and an instruction on the child abuse elements, the jury received the following instruction on conspiracy:

> The defendant … is charged with having conspired to commit physical abuse of a child, intentionally causing bodily harm.
>
> Before you may find the defendant guilty of any count of conspiracy to commit physical abuse of a child, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present with regard to that count….
>
> First, as to each count, that the defendant intended that the crime of physical abuse of a child be committed.
>
> ….
>
> … [T]he second element of conspiracy is as to each count, the defendant was a member of a conspiracy to commit physical abuse of a child.
>
> A person is a member of a conspiracy if, with intent that a crime be committed, the person agrees with or joins with another for the purpose of committing that crime….
>
> ….
>
> The third element of conspiracy … [is] that one or more of the conspirators performed an act toward the commission of the intended crime ....

This instruction largely tracked the pattern jury instruction. *See* WIS JI—CRIMINAL 570.

D. Cumulative Error And Interest Of Justice

¶67 Caminiti agues that we must consider the cumulative effect of all errors. Consistent with our discussion above, we will assume error in the admission of the expert testimony and take as conceded error in the admission of testimony that a parent pled guilty to and was convicted of child abuse. Considering this assumed and conceded error cumulatively does not change our conclusion that any error was harmless.

¶68 Finally, Caminiti argues that we should exercise our discretionary authority to reverse in the interest of justice. However, Caminiti's argument on this topic adds nothing to arguments that we have already rejected. Accordingly, we decline to reverse in the interest of justice.

Conclusion

¶69 In sum, for all of the reasons stated above, we affirm the judgment convicting Caminiti of the eight counts of conspiracy to commit child abuse. We also affirm the order denying his motion for postconviction relief.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.